

# Exhibit B



OFFICE OF THE INSPECTOR GENERAL  
UNITED STATES POSTAL SERVICE

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September 10, 2018

Mike Williams  
The Capitol Forum  
1200 New Hampshire Ave NW  
Suite 750  
Washington, DC 20036  
Email: mwilliams@thecapitolforum.com

RE: FOIA Appeal No. 2018-IGAP-00010  
FOIA Case No. 2018-IGFP--00538

Dear Mr. Williams:

This letter responds to your August 10, 2018 appeal of the Office of Inspector General's (OIG) decision to withhold all forty-two pages of a whitepaper titled "The Complex Role of Middlemen and Discounts in the USPS" pursuant to FOIA Exemption 3. 5 U.S.C. § 552(b)(3). As you know, Exemption 3 permits withholding of information pursuant to another statute. In this case, that statute is 39 U.S.C. § 410(c)(2) which allows redaction of information of a commercial nature, in this case, strategic business plans and other commercial information, which under good business practice would not be publicly disclosed. For the reasons stated below, I must deny your appeal.

FOIA Exemption 3 allows the withholding of information prohibited from disclosure by another federal statute when that statute "refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3); see also *Senate of the Commonwealth of Puerto Rico v. Dep't of Justice*, 823 F.2d 574, 582 (D.C. Cir. 1987); *Long v. IRS*, 742 F.2d 1173, 1178 (9th Cir. 1984). The Postal Service clearly defines the types of information to be withheld under 39 U.S.C. § 410(c)(2) in their FOIA Annual Report (available at: <https://about.usps.com/who-we-are/foia/annual-foia-reports/welcome.htm>).<sup>1</sup> While Exemption 3 cannot be a blank check to withhold whatever records the agency pleases, it *does* provide the agency with discretion as to what is covered by the other statute. An agency's exercise of its discretion under the secondary withholding statute has been found to be governed not by the FOIA, but by the withholding statute itself. See *Aronson v. IRS*, 973 F.2d 962, 966 (1st Cir. 1992); *Ass'n of Retired R.R. Workers v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 333 (D.C. Cir. 1987).

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<sup>1</sup> Some of the types of information withheld under (c)(2) include: information about methods of handling valuable Registered Mail; market surveys; records that would be of potential benefit to firms in economic competition with the Postal Service; information that could materially increase procurement costs; and information that might compromise testing or examination materials. The Postal Service routinely protects these records when necessary. USPS FOIA Report FY '17.

Congress has repeatedly expressed its intent that the Postal Service be run more like a business than its predecessor, the Post Office Department. This desire is stated in the Postal Reorganization Act of 1970 and amplified in the Postal Accountability and Enhancement Act of 2006 (P.L. 109-435). "Therefore, in determining whether it would be good business practice to disclose requested commercial information, the Postal Service should be expected to evaluate the business-risk posed by releasing the information in the same manner as a corporation in the commercial world. *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 742 F. Supp. 2d 76, 82 (D.D.C. 2010).

The withheld whitepaper falls within the 39 U.S.C. § 410(c)(2) category of commercial information that would not be disclosed under good business practice because it would publicize critical USPS competitive product pricing strategies, the release of which would disadvantage the Postal Service in the competitive marketplace. Numerous courts have upheld the use of this statute to protect similar sensitive commercial and business information.<sup>2</sup> The Postal Service's failure to encrypt the barcodes discussed in your appeal letter does not evidence an intent to publicize the information because barcodes cannot be read by the general public.

Though the withheld whitepaper may contain isolated words, phrases and headings that do not, on their own, constitute trade secrets, strategic business plans or other commercial information which under good business practice would not be publicly disclosed, those fragmented non-exempt words are inextricably intertwined with the exempt information withheld under FOIA Exemption 3. The D.C. Circuit has held for over 40 years that agencies are not required to comb through documents searching for releasable conjunctions and filler words that "taken separately or together have minimal or no information content." *Mead Data Center, Inc. v. U.S. Department of the Air Force*, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977). The OIG need only show the sensitive nature of the exempt information and that the non-exempt information is so intertwined that we cannot not release any meaningful portion without disclosing exempt information. *Fischer v. DOJ*, 723 F. Supp. 2d 104, 115 (D.D.C. 2010); *Schoenman v. F.B.I.*, 2009 WL 763065, at \*26 (D.D.C. Mar. 19, 2009).

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
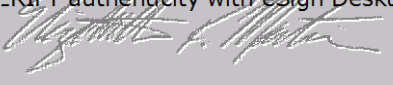
<sup>2</sup> See *Braun v. United States Postal Serv.*, 317 F. Supp. 3d 540 (D.D.C. 2018) (finding that the Postal Service may withhold information under 39 USC § 410(c)(2) to protect information systems and proprietary information); *Wickwire Gavin, P.C. v. U.S. Postal Service*, 356 F.3d 588 (4th Cir. 2004) (holding that agency properly withheld "quantity and pricing" information); *Reid v. U.S. Postal Service*, 2006 WL 1876682, \*5-9 (S.D. Ill. 2006) (finding customer's postage statements and agency's daily financial statements properly protected by 39 USC § 410(c)(2)); *Airline Pilots Ass'n, Intern. v. U.S. Postal Service*, 2004 WL 5050900 (D.D.C. 2004) (holding that agency properly withheld pricing and rate information, methods of operation and performance requirements); *Robinett v. U.S. Postal Service*, 2002 WL 1728582 (E.D. La. 2002) (finding that job-applicant information fell within USPS definition of "information of a commercial nature"); *American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 742 F. Supp. 2d 76 (D.D.C. 2010) (finding Pay for Performance program information properly withheld under 39 USC § 410(c)(2)).

Because my decision does not constitute a full grant of access to the withheld material, FOIA requires that I inform you of your right to judicial review. Such review is available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, the district in which the records are located, or in the District of Columbia.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road  
College Park, MD 20740-6001  
E-mail: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: 202-741-5770 or 1-877-684-6448  
Facsimile: 202-741-5769

Sincerely,

E-Signed by Elizabeth Martin   
VERIFY authenticity with eSign Desktop  


Elizabeth P. Martin  
General Counsel

cc: FOIA Analyst